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Products Liability and the First Amendment: The Liability of Publishers for Failure to Warn

If a manufacturer sells a hair tonic injurious to humans, an injured consumer has a potential cause of action. If a publisher publishes the formula for that same hair tonic, an injured reader has no means of legal redress.¹ What justifies this apparent anomaly? The notion that ideas hold a "preferred position" in our society is an inevitable response to that question.² But that answer only begs the question.³

Putting aside catch phrases which obscure rather than illuminate issues,⁴ the necessary starting point for any first amendment analysis is a realization that the first amendment does not categorically bar all liability for speech. Besides the familiar torts of defamation and invasion of privacy,⁵ many other torts, such as false imprisonment, intentional infliction of emotional distress, fraud, and battery, can all be accomplished by words.⁶ This Note discusses whether any conceivable circumstances exist in which a publisher⁷ owes a duty of care in the use of printed language to prevent physical harm to readers.

Three recent cases alleging a duty of care in the use of language owed by the media to the public were based in part upon a theory of products liability.⁸ The success of a plaintiff in one of these cases makes it reasonable to assume that unconventional and controversial applications of the products liability theory will continue. The first section of this Note⁹ reconciles these cases in a proposed analytic framework based upon the theory of products liability: a publisher owes a duty of care when publishing material with the intention

1. *MacKown v. Illinois Publishing & Printing Co.*, 289 Ill. App. 59, 6 N.E.2d 526 (1937). For a discussion of *MacKown*, see *infra* notes 57-60 and accompanying text.

2. *Jones v. Opelika*, 316 U.S. 584, 608 (1942) (Stone, C.J., dissenting).

3. Robert McKay argues that particular quote has been erroneously linked to Justice Stone's famous footnote in *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938), and as a result has been a source of much confusion. McKay, *The Preference for Freedom*, 34 N.Y.U. L. REV. 1182, 1184 (1959).

4. Note, *The Chilling Effect in Constitutional Law*, 69 COLUM. L. REV. 808, 840 (1969) [hereinafter referred to as *The Chilling Effect*].

5. Of course, there are some constitutional restrictions on standard of fault to be imposed in defamation actions. See *infra* notes 150-76 and accompanying text.

6. See W. PROSSER, *LAW OF TORTS* § 105, at 683 (4th ed. 11th printing 1981) [hereinafter cited as PROSSER].

7. This discussion is explicitly limited to publishers as opposed to broadcasters because the proposed theory is based upon products liability. Although the underlying principles of the proposed theory could be applied to the broadcast media, it would be stretching the imagination to find the "seller" and "buyer" required for products liability actions unless something like "pay TV" is involved.

8. See *infra* notes 15-35 and accompanying text.

9. See *infra* notes 36-55 and accompanying text.

that it be relied upon, the subject matter was such that one who acted in reliance upon it would be harmed physically should the material prove to be designed defectively,¹⁰ the defendant did not use reasonable care to determine if the material was safe for its intended use and did not warn of any dangers associated with that use, the plaintiff acted in reasonable reliance upon the published material, and the plaintiff was physically injured as a result of that reliance.¹¹

The second section of this Note illustrates that historically courts have been reluctant to hold the media liable for the content it communicates to the public, fearing the creation of a new duty resulting in potential unlimited liability of the media would be entailed.¹² The second section also demonstrates, however, that the general rule of compensation for physical harm has always been followed in other circumstances when the negligent use of language results in physical injury. Consequently, the basis of the courts' policy concerns is undermined.¹³

Courts have also feared that the imposition of a duty of care upon publishers in the use of language to prevent physical harm to readers would violate the first amendment. The third section of this Note examines the proposed theory in light of present constitutional doctrine and concludes that the proposed theory passes constitutional scrutiny.¹⁴

I. RECONCILIATION OF THE PRODUCTS LIABILITY CASES IN THE PROPOSED ANALYTIC FRAMEWORK

Three recent products liability cases brought against the media arose from contrasting factual contexts.¹⁵ In two cases, the complaints were dismissed for failure to state a claim upon which relief can be granted. In *Carter v. Rand McNally*,¹⁶ however, the plaintiff's claims alleging negligent publishing survived pretrial dismissal.¹⁷ A junior high school textbook was published containing an experiment using methyl alcohol, a highly flammable substance with combustible fumes, and included no warnings concerning these dangerous properties.¹⁸ A student was permanently scarred from an explosion of methyl

10. See *infra* text accompanying notes 48-52.

11. See *infra* note 93.

12. See *infra* notes 56-74 and accompanying text.

13. See *infra* notes 75-96 and accompanying text.

14. See *infra* notes 97-176 and accompanying text.

15. *Herceg v. Hustler Magazine, Inc.*, 565 F. Supp. 802 (S.D. Tex. 1983); *DeFilippo v. National Broadcasting Co.*, 446 A.2d 1036 (R.I. 1982); *Carter v. Rand McNally*, No. 76-1864-F (D. Mass. 1980) (unreported case cited in Swartz, *You Can't Judge a Book by Its Cover*, TRIAL, Nov. 1981, at 89, 110 [hereinafter referred to as Swartz]).

16. No. 76-1864-F (D. Mass. 1980) (unreported case cited in Swartz, *supra* note 15, at 90).

17. The plaintiff alleged failure to warn, inadequate directions in both the teacher's and the students' manual, and inadequate design. Swartz, *supra* note 15, at 90.

18.

Methyl alcohol was introduced in the textbook to these children without safety instructions and warnings, even though other less dangerous substances such as

alcohol vapors ignited by a bunsen burner flame.¹⁹ Although brought to trial in September 1980, the case was ultimately settled for \$1.1 million.²⁰

The theory of products liability was not so successful in *DeFilippo v. National Broadcasting Co.*²¹ In a 1979 episode of *The Tonight Show*, Johnny Carson attempted a stunt with the help of his guest, stuntman Gar Robinson.²² Robinson was shown standing on a gallows with a hood over his head and a noose around his neck.²³ The trapdoor opened, and he fell through uninjured.²⁴ Several hours after the broadcast, Mr. and Mrs. DeFilippo found their son, Nicky, dead, hanging from a noose in front of the television set.²⁵ The television set was on and tuned to the local station which had broadcast *The Tonight Show*.²⁶ The parents brought a wrongful death action alleging as one cause of action the theory of products liability.²⁷ The Supreme Court of Rhode Island did not reach the issue of whether a television broadcast is a product, but found in any event that the claim was barred by the first amendment.²⁸

A case factually similar to *DeFilippo*, *Herceg v. Hustler Magazine, Inc.*,²⁹ reached the same result. On August 6, 1981, a young boy discovered the body of his fourteen year-old friend hanging by a belt from a closet door.³⁰ At his dead friend's feet lay a copy of *Hustler* magazine.³¹ It was opened to an article entitled *Orgasm of Death*, describing the practice of autoerotic asphyxiation in which males seek to derive heightened sexual pleasure from masturbation by simultaneously depriving the brain of oxygen.³² The dead

glycerine or ethylene glyco would have accomplished the same academic purpose. . . . The plaintiff argued that there were no instructions to the students regarding the wearing of protective clothing such as fire-protective aprons and face shields, even though when sophisticated adults use methyl alcohol, its utilization involves adequate warnings, instructions, and a proper container for housing the product. None of these basic minimal safety procedures and precautions were recommended in the textbook despite the fact that the book was intended for use by ninth grade youngsters.

Swartz, *supra* note 15, at 90 (the author of the article was the plaintiff's attorney).

19. Swartz, *supra* note 15, at 90.

20. Swartz, *supra* note 15, at 90.

21. 446 A.2d 1036 (R.I. 1982).

22. *Id.* at 1037-38.

23. *Id.* at 1038.

24. *Id.*

25. *Id.*

26. *Id.*

27. The plaintiff's complaint actually alleged four different theories of recovery, negligence, failure to warn, products liability, and intentional tort-trespass. *Id.*

28. The trial judge had found that a television broadcast is not a product. *Id.*

29. 565 F. Supp. 802 (S.D. Tex. 1983).

30. Plaintiff's Original Complaint at 3, *Herceg*.

31. Plaintiff's Original Complaint at 3, *Herceg*.

32.

Typically, the practitioner rigs up a noose—often a rope or a belt—and cuts off his air supply at the height of sexual excitement. The brain deprived of oxygen, experiences a "high" accompanied by giddiness, light-headedness and exhilaration. Often the practitioner will pass out for a few minutes, then revive. Sometimes,

boy's parents brought a wrongful death action against *Hustler*, and the boy's friend joined as a co-plaintiff alleging physical and emotional injury.³³ The primary basis of the complaint was the theory of products liability: the magazine was defectively designed, the magazine was unreasonably dangerous for its intended use, and the magazine reached the consumer without substantial change in its condition.³⁴ The complaint was dismissed for failure to state a claim upon which relief can be granted.³⁵

The proposed theory reconciles the holdings of these cases. The salient factor in the theory is that the publisher must induce a reader to act:³⁶ the publisher must intend that the material be relied upon and the reader must reasonably do so.³⁷ The proposed theory is aimed at restricting speech "triggering action";³⁸ the speaker purposefully induces reliance, thereby dissuading readers from verifying it. Speech in that form, without any warnings, "[is] no essential part of any exposition of ideas" because its "very utterance [inflicts] injury."³⁹ The textbook case was the only one of the three products

though, he never comes out of it. . . .

One factor pops up again and again in these cases—the use by men of female undergarments or intimate apparel. The relationship between transvestite practices—cross-dressing—and sexual asphyxiation is not clear. Some psychotherapists have attempted to link erotic hangings to early childhood fascination for ropes and chains, to binding with women's undergarments, and to the whole spectrum of adult bondage and sadomasochism.

Milner, *Orgasm of Death*, HUSTLER, Aug. 1981, at 33, 34 [hereinafter referred to as HUSTLER]. The article claims that coroners estimate 1,000 young people, mostly males, die each year from the practice. HUSTLER, *supra*, at 33. "Researchers for the Federal Bureau of Investigation estimate conservatively that 500 to 1,000 such deaths occur each year in this country, but that most are misdiagnosed as suicide or homicide or covered up by the family because of the social stigma that surrounds a sexually motivated death." Brody, 'Autoerotic Death' of Youth Causes Widespread Concern, N.Y. Times, Mar. 27, 1984, at 17, col. 4. For a discussion of the autoerotic practice, see generally R. HAZELWOOD & P. DIETZ, AUTOEROTIC FATALITIES (1983).

33. Plaintiff's Original Complaint at 3, *Herceg*.

34. The exact theory (or theories) of the complaint is hard to discern. The complaint alleged negligent publishing, defective product, dangerous instrumentality, and attractive nuisance. Plaintiff's Original Complaint at 3, *Herceg*.

35. The complaint was dismissed with leave to amend on the basis of the plaintiffs' failure to meet the *Brandenburg v. Ohio* test, see *infra* notes 100-02 and accompanying text, by omitting an allegation of "incitement." *Herceg*, 565 F. Supp. at 805. However, the facts of that case make it virtually impossible for the plaintiff to meet that test.

36. Compare *Hanberry v. Hearst Corp.*, 276 Cal. App. 2d 680, 81 Cal. Rptr. 519 (1969), in which the publisher of Good Housekeeping Magazine was held liable for injuries resulting from a product given the Good Housekeeping Seal of Approval. The court held,

[s]ince the very purpose of respondent's seal and certification is to induce consumers to purchase products so endorsed, it is foreseeable certain consumers will do so, relying upon respondent's representations concerning them, in some instances, even more than upon statements made by the retailer manufacturer or distributor.

276 Cal. App. 2d at 684, 81 Cal. Rptr. at 522 (emphasis added).

37. See *supra* text accompanying note 10.

38. Professor Tribe argues that speech is valuable only in the context of a dialogue, "[i]t is not plausible to uphold the right to use words as projectiles where no exchange of views is involved." L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 12-8, at 605 (1978) [hereinafter cited as TRIBE].

39. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72 (1942).

liability cases in which inducement was present⁴⁰ since the textbook was published with explicit instructions to be relied upon, and the student acted reasonably in following them.

*Cardozo v. True*⁴¹ is another case exemplifying the concept of inducement. In *Cardozo*, a cookbook was published containing a recipe using natural ingredients. While following one of the book's recipes, the plaintiff tasted one of the ingredients called for in that recipe and became ill.⁴² The proposed theory would recognize a cause of action in such a case because a cookbook is paradigmatic of material published with the intention that readers rely upon it.

At the other end of the spectrum are the *DeFilippo*⁴³ and *Herceg*⁴⁴ cases. In *DeFilippo*, no evidence was presented that Johnny Carson or anyone else intended that the stunt be imitated. Nor is it reasonable to imitate a stunt performed by professionals aided by specially designed props when viewers are warned against it.⁴⁵ Likewise, the *Hustler* article was not written in the form of a "how-to" manual. To the contrary, explicit warnings against practicing autoerotic asphyxiation were given at the beginning and end of the article.⁴⁶ It can hardly be considered reasonable to imitate an act described when the article specifically states that 1,000 people die from doing so every year.⁴⁷

Even though the proposed theory would recognize a cause of action in the textbook case, the plaintiff would still have the burden of proving the material was "defectively designed."⁴⁸ Although the products liability cases brought to date involving speech have been based in part upon several different theories,⁴⁹ this Note argues that defective design and its subcategory failure to warn are more appropriate. In a strict liability case, an unflawed product

40. See *supra* notes 16-20 and accompanying text.

41. 342 So. 2d 1053 (Fla. Dist. Ct. App. 1977) (court dismissing breach of warranty claim against bookseller based on U.C.C.).

42. *Id.* at 1054.

43. See *supra* text accompanying notes 21-28.

44. See *supra* notes 29-35 and accompanying text.

45. Stuntman Gar Robinson told Johnny Carson before he tried the stunt, "I've seen people try things like this. . . . I happen to know somebody who did something similar to it, just fooling around and almost broke his neck." *DeFilippo*, 446 A.2d at 1038.

46. The article was prefaced: "Note: Hustler realizes the often-fatal results of the practice of 'auto-asphyxia' and recommends that readers seeking unique forms of sexual release DO NOT ATTEMPT this method. The facts are presented here solely for an educational purpose." HUSTLER, *supra* note 32, at 33. The article concluded,

[r]ecognizing the syndrome early is one way to stop a friend or relative before he or she takes the ultimate one-way trip. But it is also important to know—beyond a doubt—that auto-asphyxiation is one form of sex play you try only if you're anxious to wind up in cold storage, with a coroner's tag on your big toe.

HUSTLER, *supra* note 32, at 34.

47. See *supra* note 32.

48. See *supra* text accompanying note 10.

49. See *supra* notes 15-35 and accompanying text.

is the standard by which a flawed product is judged.⁵⁰ The proposed theory is aimed at flaws resulting from the designer's faulty judgment, not at defects resulting from one copy of published material differing from another. Therefore, the precise theory of products liability used in this Note's analysis is defective design. For purposes of this Note, the term products liability is synonymous with section 402A of the *Restatement of Torts*⁵¹ and the standard of fault imposed in defective design cases is negligence.⁵²

An important feature of the proposed theory is that a publisher can completely avoid all liability by exercising reasonable care to warn of any dangers associated with reliance on the published material.⁵³ This concept is analogous to the "unavoidably unsafe products" doctrine in traditional products liability analysis.⁵⁴ Some products, for instance vaccines, cannot be made completely safe for their intended use, but they are not defective or unreasonably dangerous because of their value to society.⁵⁵ Similarly, a publisher is not under a duty to redesign material to make it safe, only the addition of a warning is required. Therefore, the proposed theory does not act as an absolute bar to the publishing of any material potentially beneficial to society.

50. Note, *Seller's Liability For Defective Design—The Measure Of Responsibility*, 37 WASH. LEE L. REV. 237, 238 (1980) [hereinafter referred to as *Seller's Liability for Defective Design*].

51. Section 402A of the Restatement of Torts provides:

(1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if

(a) the seller is engaged in the business of selling such a product, and

(b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.

(2) The rule stated in Subsection (1) applies although

(a) the seller has exercised all possible care in the preparation and sale of his product, and

(b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

RESTATEMENT (SECOND) OF TORTS § 402A (1965).

52. There is by no means a consensus concerning the standard of fault in defective design cases but something stricter than negligence is generally applied. See, e.g., *Caterpillar Tractor Co. v. Beck*, 593 P.2d 871, 886-87 (Alaska 1979) (shifting the burden of proof to the defendant); *Suter v. San Angelo Foundry & Mach. Co.*, 81 N.J. 150, 406 A.2d 140 (1979) (proof that product did not meet consumer expectation test, then defectiveness of product is established without proof of negligence); *Morningstar v. Black and Decker Mfg. Co.*, 253 S.E.2d 666, 682 (W. Va. 1979) (imputing knowledge of defect to defendant). See generally *Seller's Liability for Defective Design*, *supra* note 50.

53. See *infra* note 118.

54. RESTATEMENT (SECOND) OF TORTS § 402A comment 2 (1965).

55.

The seller of such products, again with the qualification that they are properly prepared and marketed, and proper warning is given, where the situation calls for it, is not to be held to strict liability for unfortunate consequences attending their use, merely because he has undertaken to supply the public with an apparently useful and desirable product, attended with a known but apparently reasonable risk.

RESTATEMENT (SECOND) OF TORTS § 402A comment 2 (1965).

II. POLICY CONSIDERATIONS IN HISTORICAL PERSPECTIVE

Historically, courts have refused to recognize a cause of action based on physical injuries resulting from published or broadcast material. The underlying premise of the courts' analyses is that a recognition of the plaintiffs' claims requires the creation of a new duty. This Note demonstrates, however, that the general rule of awarding compensation for physical harm has always been followed in other instances of negligent use of language. In other words, the proposed theory does not require the creation of a new duty. Since no policy reasons justify departure from the general rule, this Note argues that a duty of care in the use of language to prevent physical harm should be imposed upon the media.

A. *The Reluctance to Impose Liability Upon the Media*

In *MacKown v. Illinois Publishing and Printing Co.*,⁵⁶ a reader brought suit against a newspaper for injuries received after using a dandruff formula recommended in the paper. The Illinois Court of Appeals dismissed the claim, finding that the newspaper owed no duty to the plaintiff.⁵⁷ The state appellate court specifically based its decision on the doctrine announced by Judge Cardozo in *Ultramares Corp. v. Touche*.⁵⁸

[N]egligent words are not actionable unless they are uttered directly, with knowledge or notice that they will be acted on, to one to whom the speaker is bound by some relation of duty, arising out of public calling, contract or otherwise, to act with care if he acts at all.⁵⁹

Since *MacKown*, courts have refused on the basis of *Ultramares* to recognize an action against the media involving physical injuries received by the public. For example, publishers are under no duty to investigate products advertised on their pages,⁶⁰ or to verify the accuracy of maps and treatises.⁶¹ Courts deny liability in these cases because of the fear that the exposure of the media "to liability to an indeterminate amount to an indeterminate class" ⁶² could have

56. 289 Ill. App. 59, 6 N.E.2d 526 (1937).

57. *Id.* at 68, 6 N.E.2d at 530.

58. The court held that "[u]nder the doctrine announced by Chief Judge Cardozo, we think that the defendant newspaper in the instant case is not liable." *Id.* (citing *Ultramares v. Touche*, 255 N.Y. 170, 174 N.E. 441 (1931)).

59. 289 Ill. App. at 67, 6 N.E.2d at 530 (quoting Judge Cardozo).

60. *E.g.*, *Yuhas v. Mudge*, 129 N.J. Super. 207, 322 A.2d 824 (Super. Ct. App. Div. 1974). See also S. METCALF, *RIGHTS AND LIABILITIES OF PUBLISHERS, BROADCASTERS AND REPORTERS* § 7.05, at 7-16 (1982). But cf. *Hanberry v. Hearst Corp.*, 276 Cal. App. 2d 680, 81 Cal. Rptr. 519 (1969) (holding a publisher liable for injuries resulting from a product given its Good Housekeeping Seal).

61. See, e.g., *De Bardeleben Marine Corp. v. United States*, 451 F.2d 140, 148 (5th Cir. 1971) (although holding the United States liable under a statutorily created duty).

62. *Yuhas*, 129 N.J. Super. at 209-10, 322 A.2d at 825 (quoting *Ultramares*, 255 N.Y. at 180, 174 N.E. at 444).

potential disastrous economic effects on the media.⁶³ The significance of the courts' reliance on *Ultramares* in these media cases derives from the fact that the plaintiffs' complaints are viewed as advocating the creation of a new duty of care as opposed to the extension of one that presently exists.⁶⁴ The creation of a new duty is essentially a question of social policy.⁶⁵ The plaintiff has the burden of proving that policy considerations weigh in his or her favor,⁶⁶ presumably something not required when a duty already exists. For example, in *Zamora v. Columbia Broadcasting Systems*,⁶⁷ the federal district court viewed the plaintiff's complaint as advocating the creation of a new duty⁶⁸ and dismissed the plaintiffs' claims on that basis. In *Zamora*, parents brought an action against the three major networks, ABC, NBC, and CBS in behalf of their minor son, Ronny, alleging that Ronny had become "involuntarily addicted to television and 'completely subliminally intoxicated' " by the violent programming offered by the networks.⁶⁹ They further alleged that the networks had breached their duty to prevent Ronny from imitating what he viewed, resulting in his murdering his eighty-three year old neighbor.⁷⁰

The court characterized the issue as whether a new duty of care owed by the media should be created: "How and why should the Court create such a wide expansion in the law of torts in Florida?"⁷¹ The plaintiffs did not demonstrate that policy considerations weighed in favor of the imposition of this duty. In fact, the plaintiffs advanced no policy reasons whatsoever in favor of their "novel" theory. No argument was made and no evidence was presented that the networks could predict and therefore prevent this type of reaction to broadcast material, something apparently his own parents could not do. On the other hand, the court found public policy reasons weighing against the plaintiffs' theory.⁷² The court pointed out that their theory gave

63. "[T]he usual publishers of newspapers, treatises, and maps lack the financial resources to compensate an indeterminate class who might read their work. Potential liability would have a staggering deterrent effect on potential purveyors of printed material." *De Bardeleben Marine*, 451 F.2d at 148.

De Bardeleben Marine, 451 F.2d at 148.

64. For example in *Herceg v. Hustler Magazine Inc.*, 565 F. Supp. 802, 803 (S.D. Tex. 1983), the court held that "[n]either does the case law support plaintiffs' cause of action for negligent publication of an article they allege harmed a reader. 'Negligent' publication is a cause of action that arose in defamation cases."

65. See PROSSER, *supra* note 6, § 42, at 244.

66. See PROSSER, *supra* note 6, § 53, at 325-26 ("But it should be recognized that 'duty' is not sacrosanct in itself, but only an expression of the sum total of those considerations of policy which say that the particular plaintiff is entitled to protection.").

67. 480 F. Supp. 199 (S.D. Fla. 1979).

68. "[T]here is no obligation (as demanded by plaintiffs) presently articulated in the law" *Id.* at 201.

69. *Id.* at 200.

70. *Id.*

71. *Id.* at 203.

72. The court also noted that the complaint was fraught with difficulties. First, Florida does not recognize the negligent infliction of emotional injuries unaccompanied by physical injury. *Id.* at 202. Furthermore, the alleged tortfeasors were joint only in the sense that the plaintiff had joined them together, the acts were separate and disconnected. *Id.* at 202 n.4. Finally, the complaint was overbroad. *Id.* at 202 n.2.

the networks no guidelines to follow in avoiding future liability and made competent administration by the courts of these types of cases impossible.⁷³ In short, the court viewed the plaintiffs' theory as "against public policy."⁷⁴

B. The Historical Fallacy

The previous discussion shows that courts customarily view negligence actions against the media as involving the creation of a new duty on the basis of *Ultramares*. However, *Ultramares* does not support this conclusion. In *Ultramares*,⁷⁵ an accounting company prepared a balance sheet for one of its customers, and a third party relying upon that balance sheet loaned the customer a considerable amount of money. The customer defaulted, and the lender brought an action against the accountants, alleging fraud and negligent misrepresentation.⁷⁶ Judge Cardozo denied liability, stating:

If liability for negligence exists, a thoughtless slip or blunder, the failure to detect a theft or forgery beneath the cover of deceptive entries may expose accountants to liability to an indeterminate amount for an indeterminate time to an indeterminate class.⁷⁷

Therefore, the accountants could not be held liable to third parties absent privity between them.

The courts' reliance on *Ultramares* in the media cases is misplaced for several reasons. First, the *Ultramares* rule is not an absolute bar to liability when privity is lacking between the plaintiff and defendant. When a defendant intends that his representations be relied upon, courts are not reluctant to impose liability merely because the plaintiff is an unidentified member of an

73. *Id.* at 202 (citing *De Bardeleben Marine*, 451 F.2d at 148; *Yuhas*, 129 N.J. Super. at 209-10, 322 A.2d at 825; *Ultramares*, 225 N.Y. 170, 174 N.E. 441).

74. The *Zamora* court left open the possibility that a more justifiable theory might be accepted. "Airway dissemination is and to some extent, should be regulated, but not on the basis or by the procedure suggested by the plaintiffs." *Zamora*, 480 F. Supp. at 203 (citations omitted).

75. 225 N.Y. 170, 174 N.E. 441.

76. American misrepresentation law owes its origins to English case *Derry v. Peek*, 14 A.C. 337 (1889). In that case a buyer of stock was induced to buy stock in a tramway company by a prospectus incorrectly stating that the company had the right to use steam power instead of horses. *Id.* Since the company did not have consent to use that power, the stock was worthless and the buyer sued in an action for deceit. *Id.* The plaintiff could not prove that the defendants consciously falsified information, an element of the action of deceit, so the defendant was found not liable. *Id.* In dictum, the court held that "[a]n action of deceit based on fraud cannot be supported by proof of negligent misrepresentation." Smith, *Liability for Negligent Language*, 14 HARV. L. REV. 184, 185 (1909) [hereinafter cited as Smith]. Although negligence was not plead in that action so relief could not be granted on that basis, that case has been interpreted to mean "not only that negligence is not the same as fraud, but also that no action whatever will lie for negligent misrepresentation." Note, VII L.Q. REV., 295, 310 (1891). Although the tort of misrepresentation is not as narrow as the action in deceit, courts have limited its application to those cases in which there is an intent to deceive and have decided actions based on strict liability and negligence in other tort actions. PROSSER, *supra* note 6, § 105, at 684. However, this basic underlying misconception has caused much confusion in misrepresentation cases. See PROSSER, *supra* note 6, § 105, at 684-85.

77. *Ultramares*, 225 N.Y. at 180, 174 N.E. at 444.

indeterminate class.⁷⁸ In *Ultramares*, Cardozo distinguished *Glanzer v. Shepherd*⁷⁹ in which he had found a public weigher of beans liable for negligence to third parties, pointing out that in *Glanzer* the information was "primarily" for the benefit of the third party and only "incidentally" for the benefit of its clients.⁸⁰ The facts of the media cases are more analogous to *Glanzer* than to *Ultramares* because the material is published for the primary benefit of readers. Secondly, modern courts err in relying on *Ultramares* because the rule has been overruled in a majority of jurisdictions.⁸¹

Most importantly, courts have failed to make the crucial distinction between economic and physical harm. Courts have always been more willing to impose liability when physical harm is involved.⁸² The *Ultramares* rule has

78. See PROSSER, *supra* note 6, § 107, at 707.

It would seem from the face of the opinion that *Ultramares* stands, not for the proposition that there can be no third-party negligent liability of accountants, but for the proposition that such liability does not exist where the certification is not for the primary benefit of the third party.

Shaw, *Liability of Public Accountant to Third Parties*, 46 A.L.R.3d 979, 986 (1972).

79. 233 N.Y. 236, 135 N.E. 275 (1922).

80. *Ultramares*, 255 N.Y. at 185, 174 N.E. at 446.

81. See PROSSER, *supra* note 6, § 107, at 705. Likewise, the English rule has been at least partially overruled in cases of economic harm. See *Hedley Byrne & Co. v. Heller & Partners*, 1964 A.C. 465. Compare section 552 of the Restatement of Torts:

(1) One who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.

(2) Except as stated in Subsection (3), the liability stated in Subsection (1) is limited to loss suffered

(a) by the person or one of a limited group of persons for whose benefit and guidance he intends to supply the information or knows that the recipient intends to supply it; and

(b) through reliance upon it in a transaction that he intends the information to influence or knows that the recipient so intends or in a substantially similar transaction.

(3) The liability of one who is under a public duty to give the information extends to loss suffered by any of the class of persons for whose benefit the duty is created, in any of the transactions in which it is intended to protect them.

RESTATEMENT (SECOND) OF TORTS § 552 (1965).

82. "Throughout the law of torts, the courts have been a great deal more reluctant to compensate the plaintiff for a loss of purely economic character, and this is particularly true where the defendant's conduct has been no more than negligent." Prosser, *Misrepresentation and Third Persons*, 19 VAND. L. REV. 231, 232 (1966). See also Note, *Torts—Action for Negligent Misrepresentation Which Causes Financial Loss in Business Dealings May be Maintained by One of Class Whose Reliance upon Such Misrepresentation Can be Reasonably Foreseen*, 48 VA. L. REV. 1476, 1479 (1962) (citing *Jones v. Stanko*, 118 Ohio St. 147, 160 N.E. 456 (1928) (negligent assurance by doctor that there was no danger from smallpox); *Skilling v. Allen*, 143 Minn. 323, 173 N.W. 663 (1919) (negligent assurance by doctor that it was safe to visit child with contagious disease); *Valz v. Goodykoontz*, 112 Va. 853, 72 S.E. 730 (1911) (negligent assurance that there was no danger from blasting operations)). The English version of the *Ultramares* rule,

never been followed in these cases. At first blush the idea of liability based on negligence in the use of language might seem incredible, but misrepresentation forms the basis of many torts, both intentional⁸³ and negligent.

A great many of the common and familiar forms of negligent conduct, resulting in invasions of tangible interests of person or property, are in their essence nothing more than misrepresentation from a misleading signal by a driver of an automobile about to make a turn, or an assurance that a danger does not exist . . . or non-disclosure of a latent defect by one who is under a duty to give a warning.⁸⁴

Historical reasons along with matters of convenience lead to the assimilation of these torts in the negligence action.⁸⁵

Somewhat of a gap in the law of torts, therefore, exists with respect to published material because at the time this merging occurred, there was no theory, such as products liability, to support a tort cause of action. Since a general duty of care in the use of language exists, the question is not, as the *Zamora* court asked, whether policy reasons justify imposing this duty on the media,⁸⁶ but whether policy reasons justify departing from the general rule.⁸⁷ Obviously, the historical basis of this discrepancy does not justify maintaining the anomaly when the physical safety of individuals is involved.

Notwithstanding the inapplicability of *Ultramares*, it is arguable that the courts' policy concerns in the media cases are nonetheless valid: the imposition of a duty of care in the use of language upon the media could have financially ruinous effects upon the industry. However, the basic premise of tort law is the protection of the physical safety of individuals.⁸⁸ Strict liability is imposed upon countless industries with the same potential for unlimited

see *supra* note 76, was never followed for physical harm either. Prosser, *Misrepresentation and Third Persons*, *supra*, at 235. Although for some time support for this position was found only in dicta of English cases not directly on point, *Liability in Negligence for False Statements*, 67 L.Q. REV. 213, 217 (1951); see, e.g., *The Spollo*, 1891 A.C. 499; *Watson v. Buckley*, 1 All E.R. (1940); *Sharp v. Avery*, 4 All E.R. 85 (1938), a recent case has resolved all ambiguity. *Clayton v. Woodman & Son Ltd.*, 2 Q.B. 533, 543 (1962) (applying the doctrine of *Donoghue v. Stevenson*, 1932 A.C. 562, establishing the liability of manufacturers to consumers not in privity for physical harm).

83. See *supra* note 6 and accompanying text.

84. PROSSER, *supra* note 6, § 105, at 683. For example, see *Washington & Berkeley Bridge Co. v. Pennsylvania Steel Co.*, 226 F. 169 (4th Cir. 1915) (contractor's assurances to foreman that bridge was safe); *Miller v. Watkins*, 355 S.W.2d 1 (Mo. 1962) (waving truck driver to pass on); *Sweet v. Ringwelski*, 362 Mich. 138, 106 N.W.2d 742 (1961) (motioning child to cross street); *Robb v. Gylock Corp.*, 384 Pa. 209, 120 A.2d 174 (1956) (assurances that acid carboys empty).

85. PROSSER, *supra* note 6, § 105, at 683.

86. See *supra* text accompanying notes 67-74.

87. Compare *Weirum v. RKO Gen.*, 15 Cal. 3d 40, 539 P.2d 36, 123 Cal. Rptr. 468 (1975), in which the court imposed liability upon a radio station for negligently conducting a contest. See *infra* text accompanying notes 109-13. In that case, the court started with the premise "that all persons are to use ordinary care to prevent others from being injured as a result of their conduct." *RKO*, 15 Cal. 3d at 46, 539 P.2d at 39, 123 Cal. Rptr. at 471.

88. Cf. *Seavey, Cardler v. Crane, Christmas & Co., Negligent Misrepresentation by Accountants*, 67 L.Q. REV. 466, 472 ("Anglo-American courts have not given the same protection to purely economic interests as has been afforded to the interest in the physical security of the person or things, of reputation or of family relations.").

liability. The law has in effect imposed a fiduciary duty upon the manufacturer by virtue of his knowingly introducing products into the stream of commerce destined for personal use.⁸⁹ No policy considerations exempt a publisher from this general duty of care in the use of language.⁹⁰ As the textbook case illustrates, "[i]t is important that we are willing to pioneer new areas of products liability because, short of prevention, this kind of prosecution is the only alternative left to encourage adequate preventive safety programs."⁹¹ When the public seeks information to protect itself, public policy considerations weigh in favor of encouraging disclosure.⁹²

The proposed analytic framework fills in the historical gap. Although it borrows language from the tort of misrepresentation,⁹³ it is explicitly based upon a products liability analysis. The body of case law surrounding the tort of misrepresentation principally deals with harm to economic interests.⁹⁴ As a matter of practicality, it seems better to advance a theory couched in terms and concepts already familiar to judges and lawyers in dealing with invasions of physical interests.⁹⁵

III. FIRST AMENDMENT ANALYSIS

A. *Prior Media Cases*

Although public policy concerns do not bar the proposed theory, courts have also been reluctant to impose liability on the media because of constitu-

89. RESTATEMENT (SECOND) OF TORTS § 402A comment c (1965) ("On whatever theory, the justification for the strict liability has been said to be that the seller, by marketing his product for use and consumption, has undertaken and assumed a special responsibility toward any member of the consuming public who may be injured by it . . .").

90. For a discussion of the constitutional considerations see *infra* notes 96-176 and accompanying text.

91. Swartz, *supra* note 15, at 90.

92. Cf. Posner, *The Uncertain Protection of Privacy by the Supreme Court*, 1979 SUP. CT. REV. 173, 176 ("Where, however, the information is sought not by members of the public, acting as it were in self protection, but by the government, the claim of privacy is stronger.") [hereinafter referred to as Posner].

93. The proposed theory is patterned after a theory designed to deal with negligent misrepresentation in economic transactions found in Smith, *supra* note 76, at 195-96.

94. See PROSSER, *supra* note 6, § 105, at 684.

95. The law of misrepresentation has to some extent adapted to invasions of physical interests but this has not led to the development of a body of case law dealing with the duty to warn. See, e.g., RESTATEMENT (SECOND) OF TORTS §§ 310, 311 (1965) (section 310 dealing with *fraudulent* misrepresentation involving an unreasonable risk of harm to another and section 311 dealing with *false* information negligently given to another). Section 557A of the Restatement of Torts does include the duty to warn: "One who by a fraudulent misrepresentation or non-disclosure of a fact that it is his duty to disclose causes physical harm to the person or chattel of another who justifiably relies upon the misrepresentation, is subject to liability to the other." RESTATEMENT (SECOND) OF TORTS § 557A (1965). The problem with those sections is that they do not carry with them extensive doctrines that the body of case law surrounding the doctrine of products liability has developed to deal with physical harm. For example, products liability has developed doctrines concerning allergies and products which are only unsafe when consumed in excess. RESTATEMENT (SECOND) OF TORTS § 402A comment j (1965).

tional concerns. Implicit in the *Herceg*,⁹⁶ *DeFilippo*,⁹⁷ and *Zamora*⁹⁸ courts' constitutional analyses is the premise that the fear of damage awards is as inhibiting to the exercise of first amendment rights as criminal sanctions; therefore, the plaintiffs can succeed only by showing that the speech in question falls into a category unprotected by the first amendment.⁹⁹

The *Brandenburg v. Ohio*¹⁰⁰ standard, which directs that a state may not "forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to produce such lawless action,"¹⁰¹ is identified as the only conceivable category in which the plaintiffs could succeed. Since the plaintiffs are unable to prove "incitement" in these cases, the courts find their claims barred by the first amendment.¹⁰²

96. See *Herceg v. Hustler Magazine, Inc.*, 565 F. Supp. 802, 804 (S.D. Tex. 1983).

97. See *DeFilippo v. National Broadcasting Co.*, 446 A.2d 1036, 1040 (R.I. 1982).

98. See *Zamora v. Columbia Broadcasting Sys.*, 480 F. Supp. 199, 204 (S.D. Fla. 1979).

99. "Those classes of speech which states may proscribe within First Amendment guidelines are obscenity, *Miller v. California*, 413 U.S. 15 . . . (1973) . . . *Roth v. United States*, 354 U.S. 476 . . . (1957); fighting words, *Chaplinsky v. New Hampshire*, 315 U.S. 568 . . . (1942); defamatory invasions of privacy, *Beauharnais v. Illinois*, 343 U.S. 250 . . . (1952); and words likely to produce imminent lawless action (incitement), *Brandenburg v. Ohio*, 395 U.S. 444 . . . (1969) (per curiam)." *DeFilippo*, 446 A.2d at 1039.

100. 395 U.S. 444 (1969).

101. *Id.* at 447 (involving a conviction of a Ku Klux Klan leader under the Ohio Criminal Syndicalism statute).

102. *DeFilippo*, 446 A.2d at 1041; see also *Zamora*, 480 F. Supp. at 206; accord *Herceg*, 565 F. Supp. at 805 (granting plaintiff's leave to amend complaint by adding allegation of incitement). Not only are the courts' analyses in *Herceg* and *DeFilippo* a gross oversimplification of first amendment law, but they are patently wrong. The *Brandenburg* test denies protection only to speech that advocates or is directed to advocating lawless action. *Brandenburg*, 444 U.S. at 447. The incitement test is one of several tests developed to deal with specific categories of speech, "none of which have been given across-the-board application. Each has been primarily utilized to sustain governmental regulation in particular contexts." Justice William Brennan, *The Supreme Court and the Meiklejohn Interpretation of the First Amendment*, 79 HARV. L. REV. 1, 11 (1965). The *Brandenburg* test is not even implicated in *Herceg* or *DeFilippo*, unless one is prepared to argue that performing a dangerous stunt is illegal or that the broadcast is an "incitement to suicide," assuming that attempting suicide is a crime.

An interesting point concerning the *Herceg* and *DeFilippo* cases is that assuming the requirements for incitement have been met, the question remains as to whether the advocated action is "suicide." Suprisingly enough, this question has sparked a considerable amount of legal debate in the context of insurance policy coverage of death due to autoerotic asphyxiation. The leading case, *Runge v. Metropolitan Life Ins. Co.*, 537 F.2d 1157, 1159 (4th Cir. 1976), held that the insurance policy's double indemnity clause for injuries sustained "solely through external and accidental means," did not apply because the decedent had "voluntarily placed himself in a situation where he knew or should have known that death or serious bodily injury should be the probable consequence of his acts." *Accord*, *Sigler v. Mutual Benefit Life Ins. Co.*, 506 F. Supp. 542 (S.D. Iowa 1981) (both defendants conceding that the autoerotic practice is not suicide). But see *International Underwriters, Inc. v. The Home Ins. Co.*, 500 F. Supp. 637 (E.D. Va. 1980) (finding that death by autoerotic practice is "injury" covered by policy, but no double indemnity clause at issue). The *Hustler* article indicated that psychologists view the deaths as accidental:

[T]he critical error is to believe that, as long as you don't actually choke yourself (compress the windpipe), you can always regain consciousness. In fact, a little too much pressure on the neck, and you get the baroreceptor reflex (which refers to little valves in an artery that halt the flow of blood when pressure is applied to the vessel).

This reflex—in the case of the main artery supplying blood to the head, the

In *Olivia N. v. National Broadcasting Co.*,¹⁰³ the court's dismissal of the complaint was based on this rationale. The plaintiff in that case, a nine year old female, alleged that she was artificially raped with a bottle on a San Francisco beach.¹⁰⁴ She claimed that her minor assailants were imitating a television movie, *Born Innocent*, broadcast four days earlier by NBC.¹⁰⁵ The movie contains a scene in which a group of teenage girls in a shower artificially raped a young girl with a toilet plunger.¹⁰⁶ During the trial,¹⁰⁷ the plaintiff admitted that she could not prove "incitement" under the *Brandenburg* standard,¹⁰⁸ and the case was dismissed on that basis.¹⁰⁹ On appeal, the trial court's decision was upheld.¹¹⁰

The *Olivia N.* court distinguished *Weirum v. RKO General*¹¹¹ as precedent

carotid—leads to rapid unconsciousness, and the victim may then fall on his noose or belt in such a way as to produce hanging and asphyxia, resulting in death.

HUSTLER, *supra* note 32, at 33.

103. 126 Cal. App. 3d 488, 178 Cal. Rptr. 888 (1981).

104. 126 Cal. App. 3d at 492, 178 Cal. Rptr. at 891.

105. 126 Cal. App. 3d at 492, 178 Cal. Rptr. at 891.

106.

The subject matter of the television film was the harmful effect of a state-run home upon an adolescent girl who had become a ward of the state. In one scene of the film, the young girl enters the community bathroom of the facility to take a shower. She is then shown taking off her clothes and stepping into the shower, where she bathes for a few moments. Suddenly, the water stops and a look of fear comes across her face. Four adolescent girls are standing across from her in the shower. One of the girls is carrying a "plumber's helper," waving it suggestively by her side. The four girls violently attack the younger girl wrestling her to the floor. The young girl is shown naked from the waist up, struggling as the older girls force her legs apart. Then, the television film shows the girl with the plumber's helper making intensive thrusting motions with the handle of the plunger until one of the four says, "That's enough." The young girl is left sobbing and naked on the floor.

126 Cal. App. 3d at 491-92, 178 Cal. Rptr. at 891.

107. That was actually the second time the case had been scheduled for trial. In an earlier proceeding, in *Olivia N. v. National Broadcasting Co.*, 74 Cal. App. 3d 383, 141 Cal. Rptr. 511 (1977), *stay denied*, 434 U.S. 1354 (1978), *cert. denied*, 435 U.S. 1000 (1978), the California Court of Appeals reversed the trial court's dismissal of the case before trial on the ground that there was no "incitement." *Id.* The court relying in part upon *RKO* ordered the trial court to impanel a jury and proceed to trial to determine if the broadcast had "resulted in actionable injuries." 74 Cal. App. 3d at 390, 141 Cal. Rptr. at 514. The California Supreme Court refused to hear the broadcaster's appeal and Justice Rehnquist, acting as circuit justice, refused to stay commencement of the trial, finding that "applicants' claims of irreparable injury resulting from the judgment of the Court of Appeals in this case are not sufficient to warrant . . . granting their application . . ." 434 U.S. at 1357 (1978), *cert. denied*, 435 U.S. 1000 (1978).

108. See *supra* text accompanying notes 100-01.

109. *Olivia N.*, 126 Cal. App. 3d at 496, 178 Cal. Rptr. at 893. On remand the plaintiff's counsel's in his opening statement to the jury stated that

[t]he plaintiffs in this case at no time in this trial are going to prove what is known as "incitement." At no time in this trial are we going to prove that either through negligence or recklessness there was incitement, which incitement is telling someone to go out encouraging them, directing them, advising them; that there will be no evidence that NBC ever told anybody or incited anyone to go out and rape a girl with an artificial instrument or in any other way.

126 Cal. App. 3d at 490-91 n.1, 178 Cal. Rptr. at 890 n.1.

110. 126 Cal. App. 3d at 495, 178 Cal. Rptr. at 893.

111. 15 Cal. 3d 40, 539 P.2d 36, 123 Cal. Rptr. 468 (1975).

for the plaintiff's claim by implying that case satisfied the incitement test.¹¹² In *RKO*, a radio station conducted a contest rewarding the first person locating a mobile disc jockey. A minor in pursuit of the disc jockey's automobile forced a car off the highway resulting in the death of the driver of the car. The widow of the deceased driver brought a wrongful death action against the owner of the radio station, Weirum General, Inc., alleging negligence. The California Supreme Court viewed the controlling issue in *RKO* as whether the defendant radio station owed a duty of care to the decedent¹¹³ and concluded that the evidence amply supported the jury's finding of a foreseeable risk to the decedent.¹¹⁴ In upholding the liability of the radio station on negligence grounds, the court readily dismissed the defendant's first amendment arguments:

Defendant's contention that the giveaway contest must be afforded the deference due society's interest in the First Amendment is clearly without merit. The issue here is civil accountability for the foreseeable results of a broadcast which created an undue risk of harm to decedent. The First Amendment does not sanction the infliction of physical injury merely because achieved by word, rather than act.¹¹⁵

Although cited in numerous cases, the broad language in *RKO* has never been the basis for any other decision imposing liability.

The *Olivia N.*,¹¹⁶ *Zamora*,¹¹⁷ and *DeFilippo*¹¹⁸ courts also expressed fears

112. "Liability was imposed on the broadcaster for urging listeners to act in an inherently dangerous manner." *Olivia N.*, 126 Cal. App. 3d at 496, 178 Cal. Rptr. at 893.

113. *RKO*, 15 Cal. 3d at 45-46, 539 P.2d at 39, 123 Cal. Rptr. at 471.

114. 15 Cal. 3d at 46, 539 P.2d at 40, 123 Cal. Rptr. at 472.

115. 15 Cal. 3d at 48, 539 P.2d at 40, 123 Cal. Rptr. at 472.

116. The plaintiff in *Olivia N.* argued that NBC "had knowledge of studies on child violence and should have known that susceptible persons might imitate the crime enacted in the film." *Olivia N.*, 126 Cal. App. 3d at 492, 178 Cal. Rptr. at 891. The *Olivia N.* court rejected that argument, fearing that it could "reduce the U.S. adult population to viewing only what is fit for children." 126 Cal. App. at 494-95, 178 Cal. Rptr. at 893. In a recent case, *Bill v. The Superior Court of San Francisco*, 137 Cal. App. 3d 1002, 187 Cal. Rptr. 625 (1982), the court relying heavily on *Olivia N.*, rejected that same theory. In *Bill*, the defendants were granted an extraordinary writ to compel the trial court to reverse its order denying summary judgment to the defendants. 137 Cal. App. 3d at 1004, 187 Cal. Rptr. at 626. At the trial level, the plaintiffs, a mother and daughter, alleged that the defendants, the producers and director of the movie *Boulevard Night*, knew that the movie would attract members of the general public "prone" to violence, that they inadequately warned patrons and did not take steps to protect the patrons, and that as a result the daughter was shot by a member of the general public attracted to that movie. 137 Cal. App. 3d at 1005, 187 Cal. Rptr. at 626. The court held that an imposition of the proposed duty and its attendant costs would have a "chilling effect" on speech. 137 Cal. App. 3d at 1014, 187 Cal. Rptr. at 634. The court made an insightful observation also relevant to the *Zamora* and *Olivia N.* cases,

it is an unfortunate fact that in our society there are people who will react violently to movies, or other forms of expression, which offend them, whether the subject matter be gangs, race relations, or the Vietnam war. It may, in fact, be difficult to predict what particular expression will cause such a reaction, and under what circumstances. To impose upon the producers of a motion picture the sort of liability for which plaintiffs contend in this case would, to a significant degree, permit such persons to dictate, in effect, what is shown in the theaters of our land.

137 Cal. App. 3d at 1008-09, 178 Cal. Rptr. at 629.

117. See *infra* text accompanying note 119.

118. *DeFilippo*, 446 A.2d at 1042.

that the plaintiffs' claims would lead to self-censorship on the part of the media. The media would alter program content in an attempt to escape liability, thereby reducing the flow of ideas to the public. The *Zamora* court warned:

[T]he liability sought for by the plaintiffs would place broadcasters in jeopardy for televising Hamlet, Julius Caesar, Grimm's Fairy Tales; more contemporary offerings such as All Quiet on the Western Front, and even The Holocaust, and indeed would render John Wayne a risk not acceptable to any but the boldest broadcasters.¹¹⁹

The theory proposed by this Note is free of the constitutional problems associated with the simple negligence theory, because it does not impose liability on the basis of the content of the published material. Liability is based on the material omitted, that is, the warning. Thus, a publisher would not be deterred from publishing anything because liability could be completely avoided by a full disclosure of risks.¹²⁰

Since the proposed theory does not directly prohibit speech, the constitutionality of requiring a warning must be examined. The issue is whether the requirement of additional speech has the indirect effect of abridging publishers' freedom of speech. Since the esoteric concept of freedom of speech has never been precisely defined by the Supreme Court and no general theory of the first amendment has been formulated,¹²¹ analysis of the proposed theory in regard to its "general" effect on freedom of speech would be futile. Instead, this Note examines specific instances in which the Supreme Court has examined the constitutionality of compelled speech requirements¹²² and the constitu-

119. *Zamora*, 480 F. Supp. at 206.

120. This Note does not reach the issue of whether material expressly intended only for the use of children might fall under a different standard, i.e., that a publisher might not be able to discharge his duty by simply adding a warning. For a discussion of the problem of material intended for children, see *Walt Disney Prods., Inc. v. Shannon*, 247 Ga. 402, 276 S.E.2d 580 (1981) (action brought under "pied-piper" theory for injuries sustained when a child attempted to reproduce a television program sound effect).

121. "The law has settled upon no tenable, internally consistent theory of the scope of the constitutional guarantee of free speech." Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 20 (1971).

122. Several instances in which compelled disclosure requirements have been found to implicate constitutional rights do not warrant detailed analysis in regard to the proposed theory. First, the right to privacy as found in the fourth amendment only restricts actions constituting a "search or seizure," *Terry v. Ohio*, 392 U.S. 1, 16 (1968), and is applied in "cases [involving] affirmative, unannounced, narrowly focused intrusions into individual privacy during the course of criminal investigations." *Whalen v. Roe*, 429 U.S. 589, 604 n.32 (1976). This, of course, is not involved in the proposed theory. Secondly, the right to privacy found in the emanations of the "penumbras" of the first, fourth, fifth, and ninth amendments, *Griswold v. Connecticut*, 381 U.S. 479, 484-85 (1965), or the fourteenth amendment's concept of personal liberty, see *Roe v. Wade*, 410 U.S. 113, 152-53 (1973), has only been applied to matters relating to marriage, procreation, child rearing, and education. *Carey v. Population Servs. Int'l*, 431 U.S. 678, 684-85 (1977).

In *Whalen v. Roe*, 429 U.S. 589 (1976), however, the Court for the first time recognized two distinct privacy interests: "One is the individual interest in avoiding disclosure of personal matters, and another is the interest in independence in making certain kinds of important decisions." *Id.* at 599-600. Assuming the Court's receptivity to this type of claim (it has never invalidated a statute on this basis), the Court's language was very fact specific, perhaps recognizing the public's fear about the collection of massive amounts of information by the government facilitated

tionality of imposing civil liability upon the media and concludes that the first amendment is not violated by the proposed theory.

B. *The Right to Silence*

Publishers might argue that the compelled speech requirement violates their right to silence. First amendment protection extends not only to the right to speak, but also to the right to refrain from speaking at all.¹²³ For convenience sake, these have been termed, respectively, positive and negative first amendment rights.¹²⁴ Of course, this right does not have across the board application. "Otherwise, the government could hardly force anyone to fill out a form, answer a census questionnaire, or testify in a civil proceeding."¹²⁵ This section analyzes the specific instances in which the right to silence has been found applicable and finds them not relevant to the proposed theory.

The right to silence owes its origins to *West Virginia State Board of Education v. Barnette*.¹²⁶ In *Barnette*, a requirement of the West Virginia State Board of Education that students and teachers salute the flag was found to violate the first amendment.¹²⁷ In announcing the opinion of the Court, Justice

by the use of computers. *Id.* at 605. See generally A. MILLER, *THE ASSAULT ON PRIVACY* (1971); A. WESTIN, *PRIVACY AND FREEDOM* (1968); Boyer, *Computerized Medical Records and the Right to Privacy: The Emerging Federal Response*, 25 BUFFALO L. REV. 37 (1975); Miller, *Computers Data Banks and Individual Privacy: An Overview*, 4 COLUM. CIV. RTS. L. REV. 1 (1972). The proposed theory does not implicate this right because subject matter voluntarily published is necessarily not private. Also, the claim of the right to privacy is not very strong when the public seeks information to protect itself. See Posner, *supra* note 92, at 176. The constitutional right to privacy must be distinguished from the tort right to privacy. In the seminal article by Warren and Brandeis published in 1890, *The Right to Privacy*, 4 HARV. L. REV. 193, the right to privacy in the context of libel actions was defined as the "right to be let alone." Warren & Brandeis, *supra*, at 193. That definition has never been adopted as a constitutional standard; "[b]ut the protection of a person's general right to privacy—his right to be let alone by other people—is, like the protection of his property and of his very life, left largely to the law of the individual States." *Katz v. United States*, 389 U.S. 347, 351 (1967).

The other context in which compelled speech has been found to implicate constitutional rights is in freedom of association. In *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958), the Court reversed a contempt citation issued against the NAACP for refusal to turn over a list of its members to the state of Alabama. That decision has never, however, been interpreted as creating any new fundamental rights. It is only interpreted as protecting the "right to join with others to pursue goals independently protected by the first amendment." *TRIBE, supra* note 38, § 12-23, at 702. Since this section of the Note shows that no independently protected constitutional rights are infringed, the right to association is not implicated.

123. *Wooley v. Maynard*, 430 U.S. 705, 714 (1977). See also *Board of Educ. v. Barnette*, 319 U.S. 624, 633-34 (1943).

124. Gaebler, *First Amendment Protection Against Compelled Expression and Association*, 23 B.C.L. REV. 995, 995-96 (1982) [hereinafter cited as Gaebler].

125. Farber, *Commercial Speech and First Amendment Theory*, 74 NW. U.L. REV. 372, 394 (1979).

126. 319 U.S. 624 (1943).

127. Although the Court held that the first amendment was violated, this decision could be explained on two different grounds: the fact that the plaintiffs, Jehovah's Witnesses, had objected on religious grounds, or the fact that refusal to salute the flag constituted symbolic speech. Lower court decisions after *Barnette* displayed both of these rationales. See Gaebler, *supra* note 124, at 995-96.

Jackson stated, "[i]f there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein."¹²⁸ The majority's opinion was based upon the idea that the law protects "the inner life of man" and prohibits government intrusions into "the sphere of intellect and reason."¹²⁹ The human conscience is injured at the moment of compromise; more speech in the form of a disavowal is not a remedy.¹³⁰

This interpretation of the right to silence is confirmed in another case to reach the Court on that same issue. In *Wooley v. Maynard*,¹³¹ the Court held a New Hampshire law requiring motor vehicles to carry a license plate with the motto "live free or die" violative of the first amendment.¹³² The Court found that although the intrusion on individual liberty was not as great as in *Barnette*, the same issue, "individual freedom of the mind," was at stake.¹³³ As in *Barnette*, the state regulation "force[d] an individual, as part of his daily life . . . to be an instrument for fostering public adherence to an ideological point of view he finds unacceptable."¹³⁴ The infringement results not merely from compelled speech, but from the individual being associated at least in his own mind with a view he finds unacceptable.¹³⁵ After finding the infringement, the Court concluded that the state had not demonstrated that the regulation was a narrowly tailored means of serving a compelling state interest.¹³⁶

The proposed theory does not implicate the compelling interest test because there is no infringement of the right to silence. As these cases demonstrate, the right to silence has only been recognized in regards to individual ideological, philosophical, and political matters. Although many publications have a conscience in the sense that they are political, religious, or ideological in their outlook, presumably their "conscience" is not violated by the involuntary recitation of factual matters cautioning the public. For instance, in the textbook case, the warning required by the proposed theory would have concerned the dangerous properties of methyl alcohol. It seems unlikely that a publisher would argue that warning the public is "morally, ethically, religiously, and politically abhorrent."¹³⁷ A publisher's objection most likely would not

128. *Barnette*, 319 U.S. at 642.

129. *Id.* at 642.

130. Gaebler, *supra* note 124, at 1007.

131. 430 U.S. 705 (1977).

132. *Wooley*, 430 U.S. at 717.

133. *Id.* at 714. The Court expressly declined to examine the symbolic speech issue, pointing out that if that was at issue, the Maynards would not be asking for "expurgated" plates. *Id.* at 713 n.10.

134. *Id.* at 715.

135. See Gaebler, *supra* note 124, at 105.

136. *Wooley*, 430 U.S. at 716.

137. *Id.* at 714 (quoting Mr. Maynard's affidavit: "I refuse to be coerced by the State into advertising a slogan which I find morally, ethically, religiously and politically abhorrent.").

be based on the content of the warning, but based on the interference in the publishing process itself.

C. Press Autonomy

The right of the press to be free from government interference was raised in *Miami Herald Publishing Co. v. Tornillo*.¹³⁸ In *Tornillo*, the Court invalidated a criminal statute making it a misdemeanor to refuse a political candidate equal space to reply to criticism voiced in the newspaper.¹³⁹ Writing for the majority, Chief Justice Burger held that "a responsible press is undoubtedly a desirable goal, but press responsibility is not mandated by the Constitution and like many other virtues it cannot be legislated."¹⁴⁰ At first glance, the majority opinion's broad language seems quite troublesome from the standpoint of the proposed theory, but *Tornillo* does not bar the theory for two reasons: later cases have narrowly interpreted *Tornillo*, and the Court's decision may be explained by traditional first amendment chilling effect analysis.

In *Tornillo*, Chief Justice Burger announced that "any such compulsion to publish that which 'reason tells them should not be published' is unconstitutional."¹⁴¹ After *Pittsburgh Press v. Commission on Human Relations*,¹⁴² it seems unlikely that a majority of the Court would agree with Chief Justice Burger's position taken to its extreme. In *Pittsburgh Press*, the Court upheld a city ordinance prohibiting the publishing of employment advertisements under sex designated headings.¹⁴³ Although the majority's decision was based upon narrow grounds, the commercial nature of the speech,¹⁴⁴ Chief Justice Burger dissented on the basis that the first amendment absolutely prohibits any governmental interference in the content of the newspaper.¹⁴⁵ *Pitts-*

138. 418 U.S. 241 (1974).

139. *Id.*

140. *Id.* at 256.

141. *Id.* The Court's use of precedent in support of its broad language in *Tornillo* is unconvincing at best. The Court principally relied upon a footnote from *Associated Press v. United States*, 326 U.S. 1 (1945) in which the Court upheld the application of antitrust laws to the media. In that footnote, the Court noted in dicta that the decision "does not compel AP or its members to permit publication of anything which their 'reason' tells them should not be published." *Id.* at 20 n.1. The Court also cited dicta from three cases to support its conclusion. *Tornillo*, 418 U.S. at 254-55 (quoting *Pittsburgh Press Co. v. Commission on Human Rights*, 413 U.S. 376, 391 (1973); *Columbia Broadcasting Sys. v. Democratic Nat'l Comm.*, 412 U.S. 94, 117 (1973); *Branzburg v. Hayes*, 408 U.S. 665, 681 (1972)).

142. 413 U.S. 376 (1973).

143. *Id.*

144. *Id.* at 389. At the time the decision was written, the Court had not recognized first amendment protection of advertising. *Id.* at 385 (quoting *Valentine v. Chrestensen*, 316 U.S. 52, 54 (1942)). However, even under present commercial speech doctrine as set out in *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm.*, 447 U.S. 557, 566 (1980), commercial speech concerning unlawful activity is not protected.

145. *Pittsburgh Press*, 413 U.S. at 394-95 (explaining that "I believe that the First Amendment freedom of the press includes the right of a newspaper to arrange the content of its paper, whether it be news items, editorials, or advertising, as it sees fit.").

burgh Press does not necessarily demonstrate support for the proposed theory, but it does show that it would not be categorically barred.

A narrower interpretation of *Tornillo* also seems more plausible in light of its characterization in *Wooley*. In *Wooley*, Chief Justice Burger writing for the majority cited *Tornillo* as support for the proposition that the first amendment protects "individual freedom of the mind."¹⁴⁶ The Court explained that the statute unconstitutionally "deprived a newspaper of the fundamental right to decide what to print or omit"¹⁴⁷ Just as the statute in *Wooley* forced the Maynards to foster a point of view which they found objectionable, the statute in *Tornillo* forced the newspaper to do much the same thing. In other words, *Wooley* and *Tornillo* are based upon the same rationale. Therefore, the protection found in *Tornillo* extends no further than *Wooley*'s.

As mentioned above, the proposed theory does not involve the interests found to be protected in the concept of "freedom of the mind."¹⁴⁸ The full disclosure requirement does not compel philosophical, political, or ideological speech, but only factual speech. Most importantly, the proposed theory does not threaten "journalistic integrity." In *Tornillo*, the effect of the statute was to compel a newspaper to print the work of an outsider. Notwithstanding the moral dilemma, an editor might be forced to publish an article of substandard quality. Since the proposed theory does not require the publishing of an outsider's work, it does not present this problem.

D. The "Chilling Effect"

The decision in *Tornillo* can also be explained by the first amendment chilling effect doctrine,¹⁴⁹ which forbids the imposition of the duty upon the press that would act as a deterrent to speech. The Court in *Tornillo* pointed out that

[f]aced with the penalties that would accrue to any newspaper that published news or commentary arguably within the reach of the right-of-access statute, editors might well conclude that the safe course is to avoid controversy. Therefore, under the operation of the Florida statute, political and electoral coverage would be blunted or reduced.¹⁵⁰

146. *Wooley*, 430 U.S. at 714. "Hence, neither *Pittsburgh Press* nor *Miami Herald* necessarily disposes of the issues presented by limited government control of a newspaper's policy toward expression that is neither completely commercial nor traditionally editorial." *The Supreme Court 1973 Term*, 88 HARV. L. REV. 13, 180 (1974).

147. *Wooley*, 430 U.S. at 714.

148. See *supra* notes 123-37 and accompanying text.

149. Gaebler argues that traditional first amendment analysis is the primary basis of *Tornillo*. Gaebler, *supra* note 124, at 997 n.4. However, this interpretation seems at odds with Chief Justice Burger's assessment of the decision:

Even if a newspaper would face no additional costs to comply with a compulsory access law and would not be forced to forgo publication of news or opinion by the inclusion of a reply, the Florida statute fails to clear the barriers of the First Amendment because of its intrusion into the function of editors.

Tornillo, 418 U.S. at 258. Suffice it to say, that the opinion rests on alternate grounds.

150. *Tornillo*, 418 U.S. at 257.

Although the Court did not specifically use the phrase "chilling effect," the concept is implicit in its analysis.¹⁵¹

Since the "chilling effect" concept has been employed in a wide variety of situations,¹⁵² it is logical to examine the proposed theory in light of the cases involving the civil liability of the media.¹⁵³ The seminal decision on that subject is *New York Times Co. v. Sullivan*.¹⁵⁴ In *New York Times*, the premise of the Court's chilling effect analysis was "that erroneous statement is inevitable in free debate, and that it must be protected if the freedoms of expression are to have the 'breathing space' that they 'need . . . to survive.'"¹⁵⁵ In order that "free debate" in society would not be inhibited, the Court held that a public official could not recover against a media defendant for defamatory statements concerning his official capacity absent "actual malice"—knowledge that the statement was false or reckless disregard of the truth or falsity of the statement.¹⁵⁶

The *New York Times* standard of actual malice was applied in the *Time, Inc. v. Hill*¹⁵⁷ which involved a right to privacy statute. In controversial dictum, Justice Brennan added that the *New York Times* standard also applies to false reports of all "matters of public interest."¹⁵⁸ He further stated that a negligence standard would never be permissible in this context, "[f]ear of large verdicts in damage suits for innocent or merely negligent misstatement,

151. The basis of the Court's chilling effect analysis in *Tornillo* is that newspapers have limited resources. "The first phase of the penalty resulting from the compelled printing of a reply is exacted in terms of the cost in printing and composing time and materials and in taking up space that could be devoted to other material the newspaper may have preferred to print." *Id.* at 256. This penalty coupled with the possible criminal sanction might deter the publishing of controversial material. *Id.* at 256. See Note, *Reaffirming the Freedom of the Press: Another Look at Miami Herald Publishing Co. v. Tornillo*, 73 MICH. L. REV. 186, 204-14 (1974) [hereinafter cited as *Reaffirming the Freedom of the Press*]. Perhaps the Court's reluctance to employ overtly the "chilling effect" doctrine suggests that it is presently in disfavor as a distinct doctrine of constitutional law. See *Reaffirming the Freedom of the Press*, *supra*, at 210 (arguing that recent decisions indicate that the Court is re-evaluating the doctrine).

152. The "chilling effect" doctrine is an all encompassing term originally used as a descriptive phrase and not as a theoretical concept. See *The Chilling Effect*, *supra* note 4, at 808-09. Justice Brennan, dissenting in *Walker v. City of Birmingham*, 388 U.S. 307, 345 (1970), coined the phrase: "We have molded both substantive rights and procedural remedies in the face of varied conflicting interests to conform to our overriding duty to insulate all individuals from the 'chilling effect' upon exercise of First Amendment freedoms generated by vagueness, overbreadth, and unbridled discretion to limit their exercise." The term has been employed in a wide variety of contexts and has developed into a doctrine in and of itself. See *The Chilling Effect*, *supra* note 4, at 808-09 (citing examples of the varied circumstances when used, e.g., *NLRB v. American Mfg. Co.*, 351 F.2d 74 (5th Cir. 1965) (word of art in labor cases); *Tennessee Pub. Co. v. Carpenter*, 100 F.2d 728, 734 (6th Cir. 1938), *cert. denied*, 306 U.S. 659 (1939) (case involving judicially regulated sales)).

153. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974); *Time, Inc. v. Hill*, 385 U.S. 374 (1967); *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

154. 376 U.S. 254 (1964).

155. *Id.* at 271-72 (quoting *NAACP v. Button*, 371 U.S. 415, 433 (1963)).

156. *Id.* at 279-80.

157. 385 U.S. 374 (1967).

158. *Id.* at 388-89.

even fear of the expense involved in their defense, must inevitably cause publishers to 'steer . . . wider of the unlawful zone.' ”¹⁵⁹

At first glance, both cases would seem by analogy to prohibit the proposed theory's standard of negligence. However, a case decided seven years after *Hill*, *Gertz v. Robert Welch, Inc.*,¹⁶⁰ casts considerable doubt on the continued vitality of the principles announced in *Time, Inc.*¹⁶¹ In *Gertz*, the Court retreated from its earlier position and denied the protection of *New York Times* to defendants in defamation actions brought by private individuals. The Court announced that “public officials” or “public figures” may recover only upon a showing of “actual malice,”¹⁶² but states are free to determine the standard of liability in actions brought by private individuals against the media “so long as they do not impose liability without fault.”¹⁶³ The Court left open the standard to be applied in actions brought by a private individual against a non-media defendant.

Although the libel analysis in *Gertz* is not directly on point, it seems likely that any constitutional analysis of the proposed theory would be based upon its methodology. In *Gertz*, the Court employed a methodology which has been called “definitional” because it presents an alternative to either absolute rules or ad hoc balancing.¹⁶⁴ Professor Tribe argues that this type of balancing is appropriate where the government aims at protecting an ideological neutral interest, such as the reputational interests of individuals.¹⁶⁵

This methodology is useful in examining the proposed theory because the interest it seeks to protect, the bodily safety of individuals, is likewise content neutral. The weighting of interests involved in the proposed theory is also analogous to the weighting of interests in a defamation action brought by private individuals, except the scales tip to a greater degree in favor of protection of the individual. In *Gertz*, the Court identified the individual's reputation interest as the value being protected¹⁶⁶ and found that private individuals are more vulnerable to injury and more deserving of protection.¹⁶⁷ The proposed theory, however, seeks to protect more than the individual's reputation; it seeks to protect his physical safety. As pointed out above, the proposed theory is an individual's only means of legal redress. Therefore, the balancing favors a negligence standard.

Furthermore, a stricter standard than negligence would virtually defeat the proposed theory. Part of the reason for the Court's shift in *Gertz* was that

159. *Id.* at 389 (quoting *New York Times Co.*, 376 U.S. at 279).

160. 418 U.S. 323 (1974).

161. See TRIBE, *supra* note 38, § 12-13, at 638-40.

162. *Gertz*, 418 U.S. at 344.

163. *Id.* at 347.

164. See Nimmer, *The Right to Speak from Times to Time: First Amendment Theory Applied to Libel and Misapplied to Privacy*, 56 CALIF. L. REV. 935, 942 (1968).

165. TRIBE, *supra* note 38, § 12-13, at 641. For a more in-depth discussion of Tribe's analysis of the balancing test, see TRIBE, *supra* note 38, § 12-20, at 682-88.

166. *Gertz*, 418 U.S. at 343.

167. *Id.* at 345.

the *New York Times* standard was so strict that "[p]lainly many deserving plaintiffs, including some intentionally subjected to injury [were] unable to surmount the barrier of the *New York Times* test."¹⁶⁸ This effect would be heightened in the proposed theory. Design features are by their very nature difficult to characterize.¹⁶⁹ Conventional products liability analysis compensates for this difficulty by applying a standard of fault stricter than simple negligence; many times knowledge is imputed to the manufacturer.¹⁷⁰ Applying a standard of fault based upon the subjective knowledge of the defendant would virtually emasculate the proposed theory.

Whatever validity the "chilling effect" doctrine has in other areas of the first amendment, none is present in failure to warn cases. In the context of defamation actions, Professor Tribe argues that the inherent flexibility of the negligence standard leaves too much room for improper motives, such as suppression of radical speakers, and other improper factors, such as prejudice, to influence the jury.¹⁷¹ This argument seems no more relevant to negligent failure to warn cases based upon published factual material than to all negligence actions. Of course, a jury might have difficulty determining what is "reasonable" conduct of a publisher. But juries are frequently asked to decide questions about which they have no prior knowledge. Courts develop doctrines so that juries do not have unbridled discretion. For instance in *Gertz*, the Court held that an action against a media defendant could not proceed unless a publisher had notice, actual or constructive, of the defamatory content.¹⁷² This workable standard could be applied to the concepts of the proposed theory to ensure that frivolous claims could be disposed of before trial.

The final possible objection to the proposed theory is essentially a "slippery slope" argument: recognition of liability based upon fault in this instance would open the floodgates to disaster. Professor Tribe argues that "the very existence of that body of law [based upon media fault] may be a threat of further encroachments on the liberties of the press inasmuch as its rules will be adaptable to other and more comprehensive systems of press regulation."¹⁷³ The logical extension of his rule, however, would bar any liability of the press based on fault, a position that has been rejected by the Supreme Court. Furthermore, the Supreme Court has never found the first amendment to give to the press rights that other citizens do not enjoy.¹⁷⁴ "[T]he

168. *Id.* at 342.

169. See Dickerson, *The ABC's of Products Liability—With a Close Look at Section 402A and the Code*, 36 TENN. L. REV. 439, 456 (1969) (Professor Dickerson argues "a design feature is often hard to characterize as legally defective, whereas a deviant item is labeled by its very abnormality.").

170. See *supra* text accompanying notes 49-53.

171. TRIBE, *supra* note 38, § 12-13, at 645.

172. *Gertz*, 418 U.S. at 348.

173. TRIBE, *supra* note 38, § 12-13, at 647.

174.

The Court has not yet squarely resolved whether the Press Clause confers upon

contention that the freedom of the press is the freedom to do wrong with impunity"¹⁷⁵ has never been accepted. Physical injury is no less harmful merely because it results from negligent language rather than from negligent deeds. As the *Weirum v. RKO General* court pointed out, "[t]he First Amendment does not sanction the infliction of physical injury merely achieved by word, rather than act."¹⁷⁶

CONCLUSION

The underlying theme of this Note's discussion is that preconceived ideas necessarily lead to superficial legal analysis. Only by eschewing labels and probing beneath the surface can issues be truly resolved. This Note has pointed to a discrepancy in the law of torts. A publisher may publish material causing physical harm with impunity, although liability is imposed for negligent use of language in many other circumstances. The proposed theory fills this historical gap and resolves policy concerns of prior cases by limiting liability to the narrowest of circumstances based upon the publisher's subjective intent that the material be relied upon. Although freedom of speech concerns are superficially implicated, an in-depth analysis of the compelled speech requirement reveals that the proposed theory does not impermissibly intrude upon any protected interest. The proposed theory is not meant to be a panacea for all cases in which published material causes physical harm, but does serve as a theoretical starting point allowing rules to give way to principles so that justice may prevail.¹⁷⁷

LISA A. POWELL

the "institutional press" any freedom from governmental restraint not enjoyed by all others. . . . Because the First Amendment was meant to guarantee freedom to express and communicate ideas, I can see no difference between the right of those who seek to disseminate ideas by way of a newspaper and those who give lectures or speeches and seek to enlarge the audience by publication and wide dissemination.

First Nat. Bank of Boston v. Bellotti, 435 U.S. 765, 798, 802 (1978) (Burger, C.J., concurring).

175. Toledo Newspaper Co. v. United States, 247 U.S. 402, 419 (1918).

176. 15 Cal. 3d 40, 48, 539 P.2d 36, 40, 123 Cal. Rptr. 468, 472 (1975).

177. See Seavey, *Candler v. Crane, Christmas & Co., Negligent Misrepresentation by Accountants*, 67 L.Q. REV. 466, 468 n.7 (1951) (quoting LORD WRIGHT, LEGAL ESSAYS AND ADDRESSES 334, "Law must be regarded as a living organism; its rules are subsidiary to justice and must, so far as precedent and logic permit, be moulded so as to conform with justice."). In that article, Seavey argued that *Candler v. Crane, Christmas & Co.*, 1951 1 ALL E.R. 426, which upheld the rule that accountants could not be held liable for merely negligent misrepresentations to one not in privity, was wrongly decided. That rule was subsequently overruled. See *supra* note 81.